IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 7-3-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

A.S. Nos.2 and 544 of 1992

A.S.No.2/1992:

1. P.Samiappa Gounder
2. P.S.Velusami
3. P.S.Prakash .. Appellants/defendants 1 to 3

vs.

1. P.K.Rajan
2. Marayammal
3. Angayammal
4. S.Sengoda Gounder .. Respondents/Plaintiff & defendants 4 to 6

A.S.No.544/1992:

S. Sengoda Gounder .. Appellant/ defendants 6

vs.

1. P.K.Rajan
2. P.Samiappa Gounder
3. P.S.Velusamy
4. P.S.Prakash .. Respondents/Plaintiffs & defendants 1 to 3

Appeal Suits against the judgment and decree dated 23.9.1991 made in O.S. No.425 of 1987 on the file of the II Additional Subordinate Judge, Erode.

For Appellants in A.S.2/92 : Mr.A.K.Kumarasamy

For Appellant in A.S.544/92 : Mr.C.Raghunatha Reddy

For 1st Respondent in both appeals : Mr.N.S.Manoharan

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JUDGMENT

The defendants 1 to 3 have preferred the appeal in A.S.No.2 of 1992 and the 6th defendant has preferred the appeal in A.S.No.544 of 1992 challenging the decree and judgment passed by the II Additional Subordinate Judge, Erode in O.S.No.425 of 1987 dated 23.9.1991.

2. The first respondent/plaintiff entered into an agreement of sale with the appellants in A.S.No.2 of 1992 (hereinafter referred as defendants 1 to 3) on 30.5.1986 with reference to the suit property measuring 4727-1/2 sq.ft. out of 1.18 acres at the rate of Rs.43/- per sq.ft. and also paid Rs.25,000/- as advance of the sale price on the date of the agreement and agreed to pay another sum of Rs.25,000/- on or before 30.6.1986 and to pay the entire balance within 5 months from the date of the agreement and complete the contract. Though the plaintiff paid the said sum of Rs.25,000/- on 28.7.1986 after a delay of about one month, the defendants 1 to 3 accepted the same and since the plaintiff failed to pay the entire balance amount within 5 months from the date of the agreement, the defendants 1 to 3 rescinded the contract and sold the property to the 6th defendant, who is the appellant in A.S.No.544 of 1992.

3. Therefore the plaintiff was constrained to file the suit for specific performance against the defendants 1 to 3 and 6. As the other two defendants 4 and 5 claimed rights over the suit property in the suit filed by them for partition and separate possession of their shares, they are made parties to the suit.

4. On the basis of the pleadings and the evidence adduced on either side, learned Subordinate Judge decreed the suit directing the appellants to execute the sale deed as prayed for by the first respondent. Hence the appellants have preferred these appeals challenging the decree and judgment passed by the Court below.

5. The averments in the plaint filed by the first respondent/plaintiff are briefly as follows:-

(a) The first defendant and his two sons, who are defendants 2 and 3, entered into an agreement of sale dated 30.5.1986 to sell the suit property to the plaintiff. As per the terms of the agreement, the plaintiff has to pay Rs.43/- per sq.ft. in respect of the suit property measuring 4727-1/2 sq.ft. out of 1.18 acres fully described in the schedule. Further the plaintiff has also paid a sum of Rs.25,000/- as advance on the date of the agreement and agreed to pay another sum of Rs.25,000/- within one month and to pay the entire balance of sale consideration within 5 months from the date of the agreement and to complete the transaction. By mutual consent between the parties, the plaintiff paid the said sum of Rs.25,000/- on

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28.7.1986 and the same was acknowledged by the defendants 1 to 3 in the agreement itself.

(b) Though the plaintiff was always ready and willing to perform his part of the contract, the defendants 1 to 3 were delaying the performance of the agreement for one reason or another. Since the agreement is one for sale of immovable property, time was not essence of the contract and therefore the plaintiff accommodated the defendants 1 to 3 to get the agreement performed in its entirety. Since the defendants 1 to 3 failed to comply with the terms of the agreement, the plaintiff issued a notice through his counsel on 2.12.1986 demanding specific performance of the agreement. Though the defendants 1 to 3 received the same, they issued a notice rescinding the agreement and contending that the advance of Rs.50,000/- is appropriated towards damages. The false allegations contained in the notice issued by them had been repudiated by a reply given by the plaintiff's counsel and he expressed the readiness and willingness to perform his part of the contract. Though the said notice was despatched by the plaintiff on 6.12.1986, the defendants received the same on 15.12.1986.

(c) Further, the defendants 1 to 3 issued a notice dated 6.12.1986 informing the plaintiff that they would be waiting at the Sub Registrar's office on 11.12.1986 to execute the sale deed after receiving the balance of the sale price. Though the plaintiff went to the Sub Registrar's office on 11.12.1986 and waited there till 5.00 p.m. with necessary amount to complete the transaction, the defendants never turned up. Hence the plaintiff issued a telegram dated 12.12.1986 informing the defendants about such facts. On the other hand, the defendants issued the next notice dated 12.12.1986 falsely alleging that they were waiting at the Sub Registrar's office on 11.12.1986 and that the plaintiff did not turn up with necessary amount to get the sale deed executed as per the agreement.

(d) However, in view of the defendants' next notice dated 12.12.1986 that again they would be waiting at the Sub Registrar's office on 17.12.1986, the plaintiff went there with necessary amount to take the sale deed from the defendants 1 to 3. But, again, the defendants 1 to 3 did not turn up as per their notice referred supra. In the above circumstances, the plaintiff did not go to the Sub Registrar's office on 5.1.1987, even though the defendants 1 to 3 informed him that they would be waiting there on that date.

(e) In this state of affairs, the defendants 1 to 3 gave another notice dated 20.4.1987 enclosing therewith two banker's cheques each for a sum of Rs.25,000/- in favour of the plaintiff on the ground that the plaintiff breached the contract and therefore the same had been rescinded by the defendants 1 to 3. However, the plaintiff issued a reply dated 27.4.1987 repudiating the averments in the

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notice given by the defendants and also returned the cheques issued by them in favour of the plaintiff. Further, in order to show the bona fide, the plaintiff also enclosed with the said notice dated 27.4.1987 two demand drafts, one for Rs.1,00,000/- and another for Rs.53,282.50 towards the balance of the sale price and thereby demanded the defendants 1 to 3 to execute the sale deed and put the plaintiff in the possession of the suit property.

(f) But, on the contrary, the defendants 1 to 3 without complying the demand made by the plaintiff addressed another notice dated 14.5.1987 to the plaintiff claiming damages to the tune of Rs.56,440/- and offering to perform their part of the contract if the plaintiff paid the said sum in addition to the amount already paid by him as noted above. On 20.5.1987, the plaintiff issued a reply refuting the allegations made in the defendants' notice and also reaffirmed the readiness and willingness to perform his part of the obligations under the agreement. Finally, the defendants issued a notice dated 2.9.1987 returning the banker's cheques sent by the plaintiff and also claiming to forfeit the earnest money of Rs.50,000/- paid by the plaintiff in pursuance of the contract. Further it was alleged that the sisters of the first defendant also claimed rights over the suit property in the pending suit filed by them for partition. On enquiry, the plaintiff learnt that the defendants 4 and 5 herein, who the sisters of the first defendant filed the suit in O.S.No.176 of 1984 on the file of the Subordinate Court, Erode against their brothers including the first defendant herein for partition of their share and also included the subject matter of the instant suit as an item to be divided by way of an amendment made as late as 20.4.1987. The plaintiff is given to understand that the defendants 1 to 3 herein instigated the defendants 4 and 5 to include this property also as an item in that suit so as to defeat the claim of the plaintiff for specific performance of the agreement.

(g) As the plaintiff has always been ready and willing to perform his part of the contract and as the defendants 1 to 3 repudiated the agreement and purported to forfeit the amount of Rs.50,000/- given as advance of the sale price, the suit is laid to enforce the agreement or in the alternative, if for any reason, the court finds that the plaintiff is not entitled to specific performance, for recovery of the amount of Rs.50,000/- paid by the plaintiff and for damages for breach of the agreement. Pending the suit agreement, the defendants 1 to 3 conveyed the suit property under two sale deeds dated 12.6.1987 and 15.6.1987 for Rs.43,665/- and Rs.42,850/- respectively to the 6th defendant, who already knew about the suit agreement in favour of the plaintiff. Since the defendants 1 to 3 colluded with the 6th defendant and created the sale deeds for inadequate consideration in order to defeat the rights of the plaintiff, the sale deeds executed by the defendants 1 to 3 in

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favour of the 6th defendants are not valid in law. Hence, it has become necessary to file the suit for specific performance of the agreement dated 30.5.1986 against the defendants and for possession of the suit property or in the alternative, for recovery of Rs.50,000/- being the advance amount paid by the plaintiff in pursuance of the agreement and for Rs.1,50,000/- as compensation for breach of the agreement by the defendants 1 to 3.

6. The contentions in the written statement filed by the first defendant and adopted by defendants 2 and 3 are briefly as follows:-

(a) The contract of sale dated 30.5.1986 is not enforceable as the plaintiff committed breach of the same. The defendants suffered a loss of Rs.56,440/- on account of the plaintiff's conduct in not completing the sale within the stipulated time and therefore the defendants have adjusted the said sum of Rs.50,000/- and the plaintiff has to pay the balance of Rs.6,440/-. After such adjustment, the defendants undertook to pay court-fee on such sum as determined by the court.

(b) Though the first defendant claims the suit property as his absolute property, it becomes a subject matter of litigation in O.S.No.176 of 1984 on the file of the Subordinate Court, Erode.

(c) Though the plaintiff adumbrated the terms of the agreement in the plaint, he has suppressed to mention that time is the essence of the contract and therefore the amount paid by him is liable to be forfeited if he fails to complete the transaction within the stipulated period. It is incorrect to state that the defendants 1 to 3 received the payment of Rs.25,000/- on 28.7.1986 after condoning the delay, but, on the other hand, since the plaintiff pleaded his inability in securing the amount, the defendants out of magnanimity accepted the same, even though the amount was not paid within the time stipulated in the agreement.

(d) Similarly, the allegation that the plaintiff was always ready and willing to perform his obligations is false. The defendants 1 to 3 were losing interest which they would have earned by discharging their liabilities within time if the plaintiff performed his part of the obligations within the stipulated time. As a matter of fact, the defendants were repeatedly requesting the plaintiff to pay the balance of sale price and to perform his part of the agreement, but the plaintiff was delaying the same. Hence the defendants 1 to 3 were forced to issue a notice on 3.12.1986 and in order to create a defence, the plaintiff caused a notice to be issued on 2.12.1986. Even before receiving the said notice dated 2.12.1986, the defendants issued a notice on 3.12.1986 putting an end to the sale agreement and forfeiting the advance.

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(e) It was not the intention of the defendants 1 to 3 to keep alive the agreement beyond the stipulated period. Even when they offered to receive the loss sustained by him amounting Rs.56,440/-, besides the sale consideration stipulated in the agreement, the plaintiff was not ready and willing to pay the same and complete the transaction.

(f) The plaintiff failed to comply with the requests made by the defendants to complete the transaction on 12.12.1986 and also on 17.12.1986. Similarly, in spite of a fresh offer, the plaintiff did not come to the Sub Registrar's office on 5.1.1987 to perform his part of the obligation as he had no money at that time.

(g) The defendants 1 to 3 informed the plaintiff by a notice dated 20.4.1987 refunding the said sum of Rs.50,000/- that they are no longer under any obligation to the plaintiff. On coming to know that the defendants 1 to 3 are likely to sell the suit property, the plaintiff issued a reply on 27.4.1987 enclosing the demand drafts for the balance sale price.

(h) On 14.5.1987, the defendants 1 to 3 returned the demand drafts issued by the plaintiff and informed him that they have forfeited the sum of Rs.50,000/- as they have incurred loss of Rs.56,440/- and also informed that the defendants 4 and 5 are laying claim over the suit property in O.S.No.176 of 1984. Therefore the allegation that the defendants 1 to 3 induced their sisters to lay a false claim is denied as false. Hence, the suit is liable to be dismissed with costs and a decree against the plaintiff has to be passed directing him to pay Rs.6,440/- being the balance towards the loss sustained by the defendants 1 to 3 and to pay necessary court-fees on the amount so ascertained by the Court.

7. The averments in the written statement filed by the appellant in A.S.No.544 of 1992, who is the 6th defendant in the suit, are briefly as follows:-

(a) It is true that the suit property belonged to the defendants 1 to 3. This defendant is not aware of the agreement dated 30.5.1986 between the defendants 1 to 3 and the plaintiff and therefore the allegations made in the plaint against this defendant are not true. This defendant is possessed of fertile lands and also had sufficient funds to set up power loom factory near Erode town. Therefore when he learnt that the defendants 1 to 3 are ready to sell their lands, he entered into the sale agreement dated 10.4.1987 with them agreeing to purchase the suit property at the rate of Rs.40/- per sq.ft. and also paid a sum of Rs.55,000/- as advance towards the sale price on the same date to defendants 1 to 3. The period of six months was stipulated for completing the sale.

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(b) There were several items of liabilities owed by the defendants 1 to 3 to third parties and this defendant discharged the same and obtained receipts from the creditors. Thereafter he obtained the sale deeds from the defendants 1 to 3 on 12.6.1987 and 15.6.1987 reciting as consideration the balance amount payable after discharge of the debts as aforesaid and also deducting Rs.55,000/- paid as advance. This defendant is therefore a bona fide purchaser for value and without notice of any prior agreement in favour of the plaintiff.

(c) The allegations in the plaint that this defendant already knew about the suit agreement in favour of the plaintiff and that he has colluded with the defendants 1 to 3 and created the sale deeds are denied as false. The plaintiff is not entitled to any relief against this defendant. There is no cause of action against him and the one alleged is not true. Hence the suit may be dismissed with costs.

8. On the above pleadings, the trial court framed the issues and recast the same as follows:-

(1) Whether the plaintiff was ready and willing to perform his part of the contract as per the agreement of sale dated 30.5.1986?

(2) Whether time was the essence of the contract between the parties?

(3) Whether the plaintiff committed breach of contract as alleged?

(4) Whether the defendants 1 to 3 are entitled to forfeit Rs.50,000/-, being the advance amount paid by the plaintiff at the time of the agreement?

(5) Whether the 6th defendant is a bona fide purchaser of the suit property for value and without notice of the prior agreement between the plaintiff and the defendants 1 to 3? If so, whether his rights are entitled to be protected under law?

(6) Whether the plaintiff is entitled to the relief of specific performance as prayed for?

(7) Whether the plaintiff is entitled to the alternative relief of recovery of the advance amount of Rs.50,000/- and damages to the tune of Rs.1,50,000/- from the defendants 1 to 3?

(8) To what relief the plaintiff is entitled?

9. In order to prove the case of the first respondent/plaintiff, he has examined himself as P.W.1 and two other witnesses as P.Ws.2 and 3 and marked the documents under Exs.A-1 to A-33. Similarly, the appellants in both the appeals/defendants 1 to 3 and 6 examined 9

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witnesses and marked the documents under Exs.B-1 to B-22. Besides the above said documents, Ex.C-1 was marked by the court.

10. Having considered the evidence both oral and documentary adduced on either side and upon hearing the arguments advanced by the learned counsel appearing for both the parties, learned Subordinate Judge held on issue Nos.1 and 2 that the plaintiff was ready and willing to perform his part of the suit agreement dated 30.5.1986 and that time was not the essence of the contract between the parties. Similarly, he rendered a finding on issue Nos.3 and 4 that the plaintiff did not commit any breach of the contract and that therefore the defendants 1 to 3 are not entitled to forfeit the advance amount of Rs.50,000/- paid by the plaintiff. However he held on issue No.5 that the 6th defendant is not a bona fide purchaser of the suit property for valuable consideration and that he had knowledge of the prior agreement between the plaintiff and the defendants 1 to 3 in respect of the suit property. Therefore he held that the 6th defendant is not entitled to any relief and that the plaintiff is entitled to the relief of specific performance as prayed for. In view of his finding on issue Nos.5 and 6, the alternative relief prayed for by the first respondent/plaintiff was not granted by the trial judge. Hence the appellants have come forwarded with these appeals challenging the decree and judgment rendered by the trial court against them.

11. Heard both sides. The parties in both appeals may be referred to hereunder as they were arrayed before the trial court.

12. Mr.A.K.Kumarasamy, learned counsel for the appellants/defendants 1 to 3 made the following submissions:-

(a) The trial court failed to exercise the principle of justice, equity and good conscience and also erred in holding that the first respondent/plaintiff is entitled to the relief of specific performance which is a discretionary relief. Similarly, it was wrongly held by the court below that the time was not made the essence of contract under Ex.A-1 without looking into the recitals in the document and the intention of the parties at the time of the execution of the agreement of sale. The subsequent exchange of notices between the parties would reveal that the time was made the essence of the contract.

(b) Further the plaintiff was not always ready and willing to perform his part of the contract, though time was extended by the defendants 1 to 3. In spite of the notice Ex.A-11 given by the defendants 1 to 3 to the plaintiff, he did not turn up before the Sub Registrar on 5.1.1987 with the balance sale price to perform his obligations nor sent any reply for the same. Though the defendants 1 to 3 offered to execute the sale deed as early as in January, 1987,

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the first respondent sent the demand drafts towards the balance of sale consideration only in the last weak of April, 1987 and therefore he was not always ready and willing to perform his part of the contract.

(c) Lastly, the finding that the appellant in A.S.No.544 of 1992/6th defendant is not a bona fide purchaser for value and without notice of the earlier agreement of sale is against the evidence and therefore the trial court ought to have rejected the evidence of P.W.1, the plaintiff as unreliable on this aspect of the matter.

13. Mr.C.Raghunatha Reddy, learned counsel for the appellant in A.S.No.544 of 1992/6th defendant submitted the following in his argument:-

(a) The trial court ought to have held that time was intended to be the essence of the contract and that since the stipulation as to such period of contract was breached, the agreement ceased to be operative with effect from 5.1.1987. The plaintiff had no capacity to raise funds to perform his part of the contract. The trial court failed to decide the issues on the basis of the evidence that the plaintiff abandoned the contract for more than four months from 23.12.1986, the date of notice Ex.A-11 until 27.4.1987. Hence the trial court failed to consider that the 6th defendant had every right to enter into the subsequent agreement of sale dated 10.4.1987 in respect of the suit property with the defendants 1 to 3.

(b) The trial court's finding that the defendants 1 to 3 and 6 are closely related to each other is erroneous. The 6th defendant had in fact discharged the loans on behalf of the defendants 1 to 3 while entering into the agreement of sale dated 30.5.1986 and therefore he is a bona fide purchaser for value and without notice of any earlier agreement. The finding of the trial court that this defendant had prior knowledge of the earlier agreement is not supported by any evidence. Similarly, the sale deeds in favour of him are valid documents executed for valuable consideration. The claim of the plaintiff as against this defendant was barred by limitation as the time prescribed by law for enforcement of the agreement of sale expired when this defendant was sought to be impleaded as party to the suit.

14. In the above circumstances, the following points arise for consideration:-

(1) Whether the time was stipulated as essence of the contract as per the terms of the agreement dated 30.5.1986 entered into between the first respondent/plaintiff and the appellants in A.S.No.2 of 1992/defendants 1 to 3?

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(2) Whether the first respondent/plaintiff was ready and willing to perform his part of the contract?

(3) Whether the first respondent/plaintiff had committed breach of the contract as alleged by the appellants?

(4) Whether the appellant in A.S.No.544 of 1992/6the defendant is a bona fide purchaser of the suit property from the appellants in A.S.No.2 of 1992/defendants 1 to 3 for value and without notice of the earlier agreement of sale dated 30.5.1986?

(5) To what relief the appellants are entitled?

15. Points (1) to (5): Since these appeals relate to the common questions formulated above and inasmuch as the parties to both the proceedings are same, it may be useful to refer them as they were arrayed before the trial court while discussing the above points for consideration. Similarly, while considering the above points, it may be necessary to refer to the same set of evidence and therefore this Court finds it convenient to consider all the points at the same time.

16. The first and foremost question for consideration is whether time was stipulated as the essence of the contract between the plaintiff and the defendants 1 to 3 (vide) Ex.A-1 agreement dated 30.5.1986. It is no doubt true that in the case of immovable properties, the general principle of law laid down by the Apex Court is that time is not always the essence of the contract. However, the parties to the agreement under Ex.A-1 stipulated that the sale deed should be executed within five months from the date of the agreement and therefore as per the contract between the parties, the defendants 1 to 3 should execute the sale deed on or before 30.10.1986 to the plaintiff, if he paid the balance of sale consideration and made available necessary stamp papers for engrossing the document. It is not disputed that the plaintiff paid a sum of Rs.25,000/- as advance on the date of the agreement under Ex.A-1 and also paid another sum of Rs.25,000/- on 28.7.1986, despite the clause in the agreement that the said amount should have been paid on or before 30.6.1986. It is admitted by the defendants 1 to 3 in their written statement itself that even such delayed payment was accepted by them and therefore the question that remains to be considered is whether the plaintiff was not ready and willing to perform his part of the obligations under Ex.A-1 within the reasonable time as stipulated therein.

17. In this context, it is relevant to point out that as early as 2.12.1986, the plaintiff issued the notice under Ex.A-4 calling upon the defendants 1 to 3 to execute the sale deed pursuant to the agreement under Ex.A-1. On the contrary, the learned counsel for the defendants has submitted that since the plaintiff failed to perform

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his part of the contract within the time stipulated in Ex.A-1, they were constrained to issue the notice under Ex.A-5 dated 3.12.1986 forfeiting the advance paid by the plaintiff and thereby rescinding the contract. However, as has been rightly pointed out by the learned counsel for the plaintiff, despite the said notice under Ex.A-4 dated 2.12.1986, the defendants issued notice Ex.A-5 on 3.12.1986 to forestall the claim of the plaintiff.

18. It is relevant to note that the defendants 1 to 3 issued notices under Exs.A-9 and A-11 dated 12.12.1986 and 23.12.1986 respectively calling upon the plaintiff to go over the Sub Registrar's office to complete the sale transaction. Similarly, it is not in dispute that on 11.12.1986 and 17.12.1986 both the parties were present in the Sub Registrar's office as it would be evident from Exs.A-8, A-10, B-2 and B-3 executed by third parties that on 11.12.1986 both the plaintiff and the first defendant attested in the documents Ex.A-8 and Ex.B-2 respectively and on 17.12.1986, the plaintiff and the first defendant attested in the documents Ex.A-10 and Ex.B-3 respectively. Learned counsel for the plaintiff as well as the defendants have fairly conceded that both the plaintiff and the first defendant had in fact affixed their signatures as witnesses to the documents and as identifying witness in Exs.A-8 & A-10 and Exs.B-2 & B-3 respectively.

19. Similarly, the evidence of the plaintiff as P.W.1 is that in spite of the reply notice Ex.A-11 from the defendants calling upon the plaintiff to go over the Sub Registrar's office on 5.1.1987 to complete the sale, the plaintiff did not go there and his explanation is to the effect that since on the earlier two occasions nothing turned out despite his presence in the Sub Registrar's office, he did not choose to go over there on 5.1.1987. The facts narrated above have to be analysed whether the totality of the circumstance would go to show and prove that the plaintiff failed to fulfil his obligations even though time was stipulated as the essence of the contract under Ex.A-1.

20. Learned counsel for the defendants would place reliance on the judgment of the Apex Court in K.S.VIDYANADAM v. VAIRAVAN (AIR 1997 S.C. 1751) in support of his strenuous contention that under similar set of facts and circumstances, it was held therein that it is inequitable to give the relief of specific performance to the purchaser if he failed to perform his part of the obligations. In the said case, an agreement of sale was entered into between the parties on 15th December, 1978 for a sum of Rs.60,000/- and Rs.5,000/- as advance was paid on the date of the agreement. It was stipulated that the sale deed should be executed within a period of six months from the date of the agreement. But, on the contrary, only on 11th July, 1981, about more than 2-1/2 years later, the plaintiff therein issued a notice to the defendants stating that he

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was always ready and willing to perform his part of the contract, that he was ready to pay the amount of Rs.50,000/- as balance of sale price and that since time was not the essence of the contract, the defendants should execute the sale deed after receiving the balance of sale consideration. After the defendants issued a reply to the said notice on 23.8.1981, the plaintiff therein instituted the suit for specific performance of the agreement and he had also prayed alternatively for the refund of the advance amount paid by him with interest. The trial court dismissed the suit. But, however, the High Court accepted the plaintiff's case and granted the relief of specific performance.

21. In the above circumstances, it was held by the Supreme Court in paragraph (11) as under:-

> "Sri Sivasubramanium cited the decision of the Madras High Court in S.V.SANKARALINGA NADAR v. P.T.S. RATNASWAMY NADAR (AIR 1952 MAD 389) holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality - and the reality is constant and continuous rise in the values of urban properties - fuelled by larger scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs.5,000/- and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs.5,000/- (as against the total consideration of Rs.60,000/-) the plaintiff did nothing until he issued the suit notice 2-1/2 years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by Courts that time is not the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. Learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the

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parties knew of the said circumstances but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent. All this only means that while exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)."

22. Further it was held therein in paragraph (13) by the Supreme Court as follows:-

"In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2-1/2 years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance."

23. Relying upon the ratio laid down in the said decision, learned counsel for the defendants has contended vehemently that since the plaintiff was indifferent and also neglected wantonly to perform his part of the obligations under the agreement of sale Ex.A-1, even though time was stipulated as the essence of the contract, the discretionary relief of specific performance should not have been granted in his favour.

24. In this juncture, Mr.N.S.Manoharan, learned counsel for the first respondent/plaintiff has pointed out with reference to the facts of this case as narrated above that the plaintiff in this case has made every endeavour to complete the sale as he was present on both occasions on 11.12.1986 and 17.12.1986 in the Sub Registrar's office with necessary funds, but the defendants were not ready to execute the sale deed. Per contra, learned counsel for the defendants has however relied on Exs.B-2 and B-3 to show the presence of the first defendant in the Sub Registrar's office in support of

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his contention that it was the plaintiff who failed to perform his part of the obligations. The categorical evidence of P.W.1 in this respect is that though he was ready on both the dates mentioned above with necessary funds to complete the sale in the Sub Registrar's office, he could not find the defendants to get the sale deed executed and that therefore even though he received the notice under Ex.A-11 from the defendants calling upon him to go over to the Sub Registrar's office on 5.1.1987, he did not choose to go there for the simple reason that again the defendants would disappoint him. It is therefore urged by the learned counsel for the plaintiff that after waiting for some time, the plaintiff issued the reply notice Ex.A-14 on 27.4.1987, to the notice Ex.A-12 issued by the defendants on 20.4.1984, enclosing two demand drafts for Rs.1,00,000/- and Rs.53,282-50 towards the balance of sale consideration and thereby calling upon the defendants to complete the sale transaction. It is seen from Ex.A-16, the notice dated 14.5.1987 issued by the defendants 1 to 3 that if the plaintiff paid further sum of Rs.56,440/- towards the alleged loss caused by the plaintiff by reason of delay, they were agreeable to execute the sale deed.

25. It is relevant to mention at this stage that on the date of Ex.A-16, the defendants were in possession of the demand drafts issued by the plaintiff for Rs.1,53,282-50, being the balance of sale consideration and in addition to the said amount, they demanded the plaintiff to pay another sum of Rs.56,440/- for completing the transaction. Therefore, learned counsel for the plaintiff has argued and in my opinion rightly that even though 5 months time was stipulated in Ex.A-1 for completing the sale, the defendants 1 to 3 were ready and willing to execute the sale deed irrespective of the time stipulated in Ex.A-1 provided the plaintiff paid more amount. Hence, he has urged that in view of the payment of Rs.25,000/- on 28.7.1986 besides the advance of Rs.25,000/- paid on the date of the agreement Ex.A-1 and considering the payment of the entire balance of sale consideration by the plaintiff along with the reply notice Ex.A-14 by way of two demand drafts to the tune of Rs.1,53,282-50, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract. Similarly, he has contended that in this case, time was not considered as essence of the contract for more than one reason and therefore he has pointed out that the facts of this case differ materially from that of the case dealt with by the Apex Court referred supra.

26. Further, according to him the defendants 1 to 3 sold the property to the 6th defendant subsequently only for a lesser price of Rs.40/- per sq.ft. and that therefore there was no phenomenal increase in the price of the suit land from the date of agreement Ex.A-1 to the date of reply Ex.A-14 when the plaintiff paid the entire balance of sale price. It is therefore urged by him that the ratio laid down in the said decision cannot be made applicable to the

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facts of this case. On a careful scrutiny of the entire facts and considering the totality of the circumstances as narrated above, I am inclined to accept the contentions put forth by the learned counsel for the plaintiff and hold that the ratio laid down by the Apex court relied on by the defendants is not applicable to the facts of the case on hand.

27. Further learned counsel for the appellant has pointed out Section 16(c) of the Specific Relief Act, 1963 and also relied on the decision VASANTHA AND 3 OTHERS v. M.SENGUTTUVAN (1997-2-L.W. 820) in support of his further contention that in view of the said provision of law, since the plaintiff has failed to prove that he was ready and willing to perform the essential terms of the contract under Ex.A-1, he has to be non-suited.

28. The relevant ratio in paragraph 15 of the decision reads as under:-

> "In AIR 1967 II S.C.W.R. 147 (GOMATHINAYAGAM PILLAI AND OTHERS v. PALANI SWAMI NADAR), the Supreme Court held that in a suit for specific performance, plaintiff must prove readiness and willingness. The relevant portion of the said decision reads thus:-
>
> "The respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in ARDESHIR MAMA v. FLORA SASSOON: "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and date of hearing of the suit.
>
> Even if for a single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing."

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29. On the contrary, learned counsel for the first respondent has pointed out the evidence of the case as narrated above and contended that in view of the ratio laid down by the Apex Court in GOMATHINAYAGAM PILLAI AND OTHERS v. PALANI SWAMI NADAR (AIR 1967 II S.C.W.R. 147) as referred to above, the plaintiff has proved categorically that he was ready and willing to perform his part of the contract. Similarly, he has also adverted my attention to the decision of this Court in GURUSWAMI GOUNDER v. KESAVA REDDIAR AND ANOTHER (1996-1-L.W. 675) in support of his further contention that readiness and willingness of the purchaser have to be decided on the facts of each case and therefore he has strenuously contended that in this case, since the first respondent has not only remitted the entire balance of consideration by means of demand drafts and the appellants retained the said demand drafts for about 5 months without fulfilling their part of the obligation under the agreement Ex.A-1, it cannot be said that the first respondent was not ready and willing to perform his part of the contract at any time.

30. A careful reading of the ratio laid down by the Supreme Court in AIR 1967 II S.C.W.R. 147 referred supra would indicate that the intending purchaser has to allege and prove that he was ready and willing to perform his part of the contract. It is no doubt true that in this case, the first respondent has not only made specific allegations in the plaint that he has always been ready and willing to perform his part of the obligations under the agreement, but also demonstrated by remitting the entire balance of sale consideration by means of demand drafts to the appellants long prior to the suit as referred to above. In view of the facts and circumstances of this case in the light of the ratio laid down by the Apex Court AIR 1967 II S.C.W.R. 147 referred supra, I am inclined to accept the contention put forth by the learned counsel for the first respondent and hold that the first respondent has succeeded in establishing the fact that he was ready and willing to perform his part of the contract continuously from the stipulated time till the date of suit and that time was not essence of the contract in this case.

31. Though the learned counsel for the appellants would urge that the subsequent conduct of the plaintiff in keeping quiet between 20.4.1987, the date of the notice under Ex.A-11 issued by the defendants enclosing cheques for Rs.50,000/- paid by the first respondent as part payment towards the agreement under Ex.A-1 and 27.4.1987, date of the reply issued by him under Ex.A-14 along with two demand drafts for the remaining balance of sale consideration to the tune of Rs.1,53,282-50 would amount to abandonment of the contract. Therefore he has argued vehemently that since the contract was cancelled at the instance of the defendants, the plaintiff is not entitled to the discretionary relief of specific performance as prayed for.

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32. In answer to such contention, learned counsel for the first respondent has referred to the decision 1996-1-L.W.675 cited supra in support of his argument that the plaintiff has been continuously demanding the defendants 1 to 3 to perform their part of their contract and that merely because of the defendants 1 to 3 issued the notice under Ex.A-12 cancelling the agreement, it cannot be said that the contract was frustrated by reason of inaction on the part of the plaintiff.

33. In view of the ratio of the decision cited above and considering the totality of the evidence in this case, I am inclined to accept the argument put forth by the learned counsel for the first respondent and find that since time was not insisted upon as essence of the contract in this case by both the parties, the mere issuance of the notice under Ex.A-12 by the defendants 1 to 3 could not have at any stretch of imagination put an end to the contract entered into between the parties (vide) Ex.A-1. Hence, on this aspect also, I am unable to accept the contention of the learned counsel for the appellants in this case.

34. The next question for consideration is whether the appellant in A.S.No.544 of 1992/6th defendant in the suit is a bona fide purchaser of the suit property for value and without notice of the earlier agreement Ex.A-1. Exs.A-20 and A-21, the registered sale deeds executed by the defendants 1 to 3 in favour of the 6th defendant on 12.6.1987 and 15.6.1987 for Rs.43,665/- and Rs.42,850/- respectively in respect of the suit property. The evidence of the 6th defendant as D.W.6 is that he agreed to purchase the suit property at the rate of Rs.40/- per sq.ft. and entered into the agreement Ex.B-1 dated 10.4.1997 with the defendants 1 to 3. According to him, the suit property measures 4805 sq.ft. and as per Ex.B-1, he agreed to purchase the same at the rate of Rs.40/- per sq.ft. and paid a sum of Rs.55,000/- to the vendors by way of advance and agreed to complete the sale within six months thereafter. In this connection, learned counsel for the first respondent/plaintiff has drawn the attention of this Court that if the evidence of D.W.6 were to be true, he ought to have paid a sum of Rs.1,92,200/- as consideration in respect of the property measuring 4805 sq.ft. valued at the rate of Rs.40/- per sq.ft. On the contrary, Exs.A-20 and A-21 were executed for a total consideration of Rs.43,665/- and 42,850/- aggregating to Rs.86,515/- only and therefore he has urged that D.W.6 is not a bona fide purchaser of the suit property for valuable consideration.

35. Though D.W.6 would explain such discrepancy in his evidence that after discharging the liabilities due by the vendors, the balance of sale consideration only had been recited in Exs.A-20 and A-21, a fair reading of the said documents would go to show and

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prove that such contention put forth by him is not supported by any recital in the documents. But, on the other hand, Exs.A-20 and A-21 read as if the said amounts had been paid as total consideration for the entire extent of 4805 sq.ft. It is therefore urged by the learned counsel for the first respondent that he cannot be considered as a bona fide purchaser for value.

36. Further he has referred me to the evidence of P.W.2 and P.W.3 to show that D.W.6 is closely related to the vendors under Exs.A-20 and A-21. Similarly, he has also adverted my attention to the evidence of D.W.6 himself wherein he would admit that the vendors under the said sale deeds are closely related to him. Though D.W.6 would deny knowledge of earlier agreement, Ex.A-1, the totality of the facts and circumstances as discerned from the evidence of D.W.1 and D.W.6 would indicate that he could have had sufficient knowledge of the earlier agreement under Ex.A-1 before ever he entered into the contract with his vendors under Ex.B-1.

37. Relying upon the above evidence, learned counsel for the first respondent has contended that as per Section 19(b) of the Specific Relief Act, D.W.6 cannot be considered as a bona fide purchaser in good faith and without notice of the original contract. Section 19(b) of the Specific Relief Act reads as follows:-

> "19. Relief against parties and persons claiming under them by subsequent title.-- Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against--
>
> (a) ...
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;"

38. In this juncture, learned counsel for the first respondent has relied upon the decision of a Division Bench of this Court in MUNISWAMY.R. AND 6 OTHERS v. P.PANDIARAJAN AND 3 OTHERS (1993-1-L.W. 186) wherein it was held that the subsequent purchaser in good faith and without any notice of prior contract should prove that he made necessary enquiry about the prior encumbrance with reference to the property and also had taken steps to discharge the subsisting liabilities over the same. On the basis of the dictum of law laid down in the said decision if the evidence of D.W.2, D.W.4, D.W.8 and D.W.9, creditors of the vendors under Exs.A-20 and A-21 is scrutinised, one would come to the irresistible conclusion that the encumbrances as spoken to by the said witnesses have not been quoted in the sale deed Exs.A-20 and A-21 so as to show that D.W.6 had discharged the liabilities. On the contrary, as referred to above, Exs.A-20 and A-21, the sale deeds are silent with reference to any

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encumbrance subsisting over the suit property. It follows that the subsequent purchaser, namely, D.W.6 cannot be considered as a transferee for value, who has paid the money in good faith and without notice of the original contract under Ex.A-1. For the reasons aforesaid, this Court finds that the appellant in A.S.No.544 of 1992/6th defendant has not discharged the burden of proving that he is a bona fide purchaser of the suit property for value and without notice of the prior contract under Ex.A-1.

39. In the above circumstances, learned Subordinate Judge directed D.W.6, who is the 6th defendant, to execute the sale deed in favour of the plaintiff, as he cannot claim any rights over the suit property by virtue of Exs.A-20 and A-21 executed by the defendants 1 to 3 in his favour. For the same reason it can be held that his contention that the suit against him is barred by limitation has no basis and is therefore rejected as unsustainable.

40. Having regard to the entire evidence and the facts and circumstance of the case, this Court finds no reason to interfere with the impugned judgment rendered by the trial court.

41. For the aforesaid reason, these appeals are liable to be dismissed and are dismissed accordingly. However, there shall be no order as to costs.

dpp

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The II Additional Subordinate Judge, Erode.

2. The Section Officer, V.R.Section, High Court, Madras.

+ 1 cc to Mr.A.K. Kumarasamy, Advocate SR No.10925

+ 1 cc to Mr.N.S.Manoharan, Advocate SR No.11059

TEJ(CO)
SR/7.6.2006

Judgment
in
A.S. Nos.2 & 544 of 1992

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